

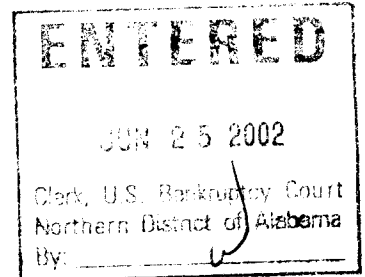
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:

Shook & Fletcher Insulation Co.,

Debtor.

Case No.: 02-02771-BGC-11



ORDER
(On Discovery of Reserve Information)

I. Background

The matters before the Court are one unresolved portion of the Debtor's Motion to Compel Discovery From Travelers Casualty and Surety Company filed on June 3, 2002, and the related portion of Travelers Casualty and Surety Company's Opposition to Debtor's Motion to Compel Discovery filed on June 5, 2002.¹ After notice, a hearing was held on June 6, 2002. Appearing were: Richard Wyron, Richard Carmody, Jonathan Guy, and Jayne Conroy, the attorneys for the debtor; Clark Watson, Eric Ray, James Rocap, III and Michael Komar, the attorneys for Travelers Casualty and Surety Company; Nancy Davis and David Anderson, the attorneys for the Asbestos Claimants Committee; and Patrick Darby for the Killions.

The unresolved portion of the debtor's motion is the debtor's request to Travelers for documents relating to reserves set by Travelers with respect to any liability of Travelers to the debtor. (See paragraph 4 on page 6 of Attachment 3 to the debtor's Motion to Compel (Attachment 3 is the Debtor's Request for Production of Document by Travelers Casualty and Surety Company)).

II. Discussion

Rule 26(b)(1) of the Federal Rules of Civil Procedure reads in part, "Parties may obtain discovery regarding any matter, not privileged, that is relevant...." Fed.R.Civ.P. 26(b)(1). This Court has applied that two-prong test here. See American Medical Systems Inc. v. National Union Fire Insurance Co. of Pittsburg, Inc., No. 98-1788, 1999 WL 781495, at *3 (E.D. La. Sep 29, 1999).

¹In an order entered on June 21, 2002, this Court held that Travelers Casualty and Surety Company's Opposition to Debtor's Motion to Compel Discovery was moot. That ruling reflected the parties' resolution of all matters except for the one addressed by this order.

182

A. Privilege

Travelers suggests that it may have claims of privilege to the requested material but it has not claimed any particular privilege. In its Opposition to Debtor's Motion to Compel Discovery Travelers writes, "The setting of reserves may also reflect actual or anticipated litigation and is subject to the attorney-client privilege or the work-product doctrine because reserves have been established based on the advice and assistance of counsel and reflect counsel's mental impressions, theories and opinions." Travelers Casualty and Surety Company's Opposition to Debtor's Motion to Compel Discovery at 8, filed June 5, 2002, Proceeding No. 149.

If Travelers contends that the material sought is protected by privilege, it has the burden of claiming and proving privilege. See Allendale Mutual Insurance Co. v Bull Data Systems, Inc., 152 F.R.D. 132, (N.D. Ill. 1993) ("As with the work product privilege, the burden is on the party opposing discovery to show that the attorney-client privilege applies, and mere conclusory statements will not suffice to meet the burden." Id. at 139 (citing United States v. White, 950 F.2d. 426, 430-31 (7th Cir. 1991)).

Travelers has not made that showing here. Consequently the Court may consider the second part of the test, that is, is the material relevant.

B. Relevance

Rule 26(b)(1) reads:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

Fed.R.Civ.P. 26(b)(1) (emphasis added).²

Most, if not all, of the cases cited by the parties agree on one proposition, that is whether reserve information is discoverable depends on whether that information is

²Rule 26 applies to this matter pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure.

relevant to the issue of the contest. However, there is little other agreement. Couch on Insurance explains:

Overall, there is little unanimity on the discovery of an insurer's loss reserves. Many cases have allowed such discovery to some degree, while many others have denied such discovery requests, sometimes on the grounds that the purpose of setting reserves is such that the information is simply not relevant to what an insurer thought of the merits of a claim.

Couch on Ins. § 251:29 (3rd ed. 2000) (footnotes omitted).

When then is reserve information relevant? The opinion in General Electric Capital Co. v. DirectTV, Inc., 184 F.R.D. 32 (D. Conn. 1998) offers this summary which supports the general proposition presented by Couch. That summary reads:

The first issue is whether the documents pertaining to loss reserves are relevant. Under the Federal Rules of Civil Procedure, the scope of discovery extends to "any matter not privileged which is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ..." Fed.R.Civ.P. 26(b)(1). The phrase " 'relevant to the subject matter involved in the pending action' ... has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978).

Defendants contend that loss reserve information is relevant only in cases where an insured has sued an insurer regarding coverage, in that certain information as to actions taken by insurers in setting up reserves is presumably relevant to the subject matter of the lawsuits. Compare Sundance Cruises Corp. v. American Bureau of Shipping, 87 Civ. 819(WK), 1992 WL 75097 at *2 (S.D.N.Y. Mar. 31, 1992) (loss reserve information not discoverable); Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co. 117 F.R.D. 283, 288 (D.D.C.1986) (same conclusion reached even in insurance coverage action); Union Carbide Corp. v. Travelers Indem. Corp., 61 F.R.D. 411, 413 (W.D.Pa. 1973) (same) with Simon v. G.D. Searle & Co., 816 F.2d 397, 404 (8th Cir.1987) (in product liability case, corporate risk management documents were discoverable), cert. denied, 484 U.S. 917, 108 S.Ct. 268, 98 L.Ed.2d 225 (1987); Culbertson v. Shelter Mut. Ins. Co., Civ.A. 97-1609 & -1669, 1998 WL 743592, at *1 (E.D.La. Oct. 21, 1998) (reserve information is discoverable where claim of bad faith is made against defendant- insurer); Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181, 192-93 (D.D.C.1998) (same);

Savoy v. Richard A. Carrier Trucking, Inc., 176 F.R.D. 10, 12 (D.Mass.1997) (same); North River Ins. Co. v. Greater New York Mut. Ins. Co., 872 F.Supp. 1411, 1412 (E.D.Pa.1995) (same).

Id. at 34-35.

In the instant case the debtor seeks:

All documents in your possession, custody, or control, including without limitation recordings of communications, relating or referring to the level of reserves set by Travelers with respect to any liability of Travelers to the Debtor.

In its Debtor's Supplemental Motion in Support of Its Motion to Compel Discovery from Travelers, the debtor states, "It is in the context of Travelers' allegations of bad faith that Debtor seeks discovery of Travelers' reserve information, which is likely to lead to admissible evidence showing that Travelers' own conduct constitutes an admission that there is, at least, a good faith basis for Debtor's coverage positions." Id. at 5-6.

Does that context make the information sought relevant? Based on the available case law, (of which there is little in the bankruptcy context), this Court cannot say that it does, at least to the extent the debtor seeks. However, in the context of proving a "good faith basis for Debtor's coverage positions," what is relevant is a simple "yes" or "no" answer by Travelers to the question: Did Travelers establish reserves for asbestos-related claims against the debtor? What the amounts, limitations, or characteristics of those reserves (if actually set aside) do not appear to be relevant at this time. See Savoy v. Richard A. Carrier Trucking, Inc., 176 F.R.D. 10, 13 (D. Mass. 1997). Once Travelers has answered the basic question, the debtor may have justification for renewing its request for more detailed information.³

III. Conclusion

Consequently, the debtor's motion is due to be granted in part and denied in part. Whether Travelers set aside reserves is relevant on the narrow question of the debtor's right to support its good faith claims.

IV. Order

Based on the above, it is **Ordered**:

³However, this Court intends to hold the parties to their agreed discovery and trial schedule.

1. In regard to the issue of insurance reserves, the Debtor's Motion to Compel Discovery From Travelers Casualty and Surety Company is **GRANTED IN PART AND DENIED IN PART**. Within ten days of the effective date of this order, Travelers shall advise the debtor whether it established reserves for asbestos-related claims against the debtor. The Court finds, without prejudice to the debtor to prove later, that any remaining information sought in the pending motion is not relevant.
2. In regard to the issue of insurance reserves, Travelers Casualty and Surety Company's Opposition to Debtor's Motion to Compel Discovery is **SUSTAINED IN PART AND OVERRULED IN PART** consistent with the ruling on the debtor's motion.

DONE this the 25th day of June, 2002.


BENJAMIN COHEN
United States Bankruptcy Judge

BC:pb